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ALEXANDER L. STEVAS,

No. 82-1948

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

ED CANTRELL,

Petitioner,

vs.

REBECCA L. ROSA, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF MICHAEL ROSA, DECEASED,

Respondent.

RESPONSE OF CITY OF ROCK SPRINGS, MATT BIDER AND JAMES CALLAS TO ED CANTRELL PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES TENTH CIRCUIT COURT OF APPEALS

GLENN PARKER
HIRST & APPLEGATE
200 Boyd Building
P. O. Box 1083
Cheyenne, Wyoming 82001
(307) 632-0541

Attorneys for
City of Rock Springs
Matt Bider and James Callas

QUESTIONS PRESENTED FOR REVIEW

The City of Rock Springs, Matt Bider and James Callas agree that Petitioner has presented the questions which this Court should review, namely:

1. Did the United States Tenth Circuit Court of Appeals abuse its judicial function in reversing factual findings of the District Court and by making its own factual findings which were not supported by the record?

2. When a State Statute of Limitations is adopted for use under a Federal statute, must a Court also adopt the State statutory scheme for tolling the Statute of Limitations?

3. Does a Plaintiff suing for wrongful death damages she sustained due to the death of her husband have a cognizable claim under 42 U.S.C. §1983?

TABLE OF CONTENTS

	Page
PARTIES TO THE PROCEEDINGS	1
SUPPLEMENTAL ARGUMENT ON THIRD QUESTION PRESENTED FOR REVIEW, "DOES A PLAINTIFF SUING FOR WRONGFUL DEATH DAMAGES SHE SUSTAINED DUE TO THE DEATH OF HER HUSBAND HAVE A COGNIZABLE CLAIM UNDER 42 U.S.C. §1983?"	2

TABLE OF AUTHORITIES

CASES	Page
Ashley v. Read Construction Company, 195 F. Supp. 727, 729 (D. Wyo. 1961)	5
Beard v. Robinson, 563 F.2d 331 (7th Cir. 1977)	3
Brazier v. Cherry, 293 F.2d 401 (5th Cir. 1961)	3
Coliseum Motor Co. v. Hester, 3 P.2d 105 (Wyo. 1931)	4
DeHerrera v. DeHerrera, 565 P.2d 479, 482 (Wyo. 1979)	5
Hall v. Wooten, 506 F.2d 564 (6th Cir. 1974)	3
Holmes v. Silver Cross Hospital of Joliet, Illinois, 340 F. Supp. 125 (N.D. Ill. 1972)	3
Javits v. Stevens, 382 F. Supp. 131, 135 (S.D. N.Y. 1974)	3
Larson v. Wind, 542 F. Supp. 25 (D. Kans. 1982)	3
Moor v. County of Alameda, 411 U.S. 693, 93 S.Ct. 1785, 36 L.Ed.2d 596, 606 (N 14)	3
O'Malley v. Brierley, 477 F.2d 785 (3rd Cir. 1973)	3
Roberts v. Rowe, 89 F.R.D. 398 (S.D. W.Va. 1981)	3
Robertson v. Wegmann, 436 U.S. 584, 98 S.Ct. 1991, 56 L.Ed.2d 554, 560	3
Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573, 39 L.Ed.2d 9, 94 S.Ct. 806	5

Spence v. Staras, 507 F.2d 554
(7th Cir. 1974) 3

U.S. v. Biloxi Municipal School District,
219 F. Supp. 691 (S.D. Miss. 1963) affd.
326 F.2d 237 (5th Cir.) cert. den. 379
U.S. 929, 855 S.Ct. 324, 13 L.Ed.2d 341 (1924) ... 3

STATUTES

42 A.L.R.F. 163, 169 3

42 U.S.C. §1983 2,3,7

42 U.S.C. §1988 3,7

W.S. 1977 §1-14-101 3

W.S. 1977 §2-14-201 4,6

W.S. 1977 §2-14-202 4,6

W.S. 1982 Repub. §1-38-101 4,6

W.S. 1982 Repub. §1-38-102 4,6

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PARTIES TO THE PROCEEDINGS

Respondent, Rebecca L. Rosa, as Personal Representative of the Estate of Michael Rosa, Deceased, pursuant to Letters of Administration issued in the State of Colorado, was Plaintiff in the District Court. Defendants in that Court were Ed Cantrell, Public Safety Director of the City of Rock Springs, the City of Rock Springs, Matt Bider, James Callas, City police officers, and a number of other Defendants, who were dismissed in the District Court by stipulation.

The City of Rock Springs, Matt Bider and James Callas, having been requested to respond to the Petition for Writ of Certiorari in this Court, adopt by reference the Petitioner's questions presented for review, Petitioner's statement of jurisdiction, statement of the case, appendices and the text of authorities,[1] but specifically request that the Court consider their supplemental argument on the third question presented for review, namely:

> "Does a plaintiff suing for wrongful death damages she sustained due to the death of her husband have a cognizable claim under 42 U.S.C. §1983?"

SUPPLEMENTAL ARGUMENT ON THIRD QUESTION PRESENTED FOR REVIEW, "DOES A PLAINTIFF SUING FOR WRONGFUL DEATH DAMAGES SHE SUSTAINED DUE TO THE DEATH OF HER HUSBAND HAVE A COGNIZABLE CLAIM UNDER 42 U.S.C. §1983?"

This question in the case, which is one of paramount interest, especially vital to the City of Rock Springs and its officers, was not satisfactorily answered by the Circuit Court, but was actually by-passed with the ambiguous statement that:

> "Inasmuch as the allegations in Rosa's Complaint survive her husband's death and seek damages for deprivation of the civil rights, it might be argued that it is a different claim from that for personal injuries." (Petitioner's Appendix p. 43)

Could Plaintiff Rosa have a cognizable claim for *damages she sustained personally* because of the violation of another's right under 42 U.S.C. §1983? It is submitted that she could not. If the constitutional rights of anyone were violated, they were those of decedent Rosa, not those of Plaintiff. One may

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[1]Subject to corrections — "Bider" for "Binder" p. ii, "56 L.Ed.2d 554" for "56 L.Ed. 544" p. 6 and "81 L.Ed. 685" for "81 L.Ed.2d 685" p. 13.

not sue under 42 U.S.C. §1983 for deprivation of another's constitutional rights. *Javits v. Stevens,* 382 F. Supp. 131, 135 (S.D. N.Y. 1974); *O'Malley v. Brierley,* 477 F.2d 785 (3rd Cir. 1973); *U.S. v. Biloxi Municipal School District,* 219 F. Supp. 691 (S.D. Miss. 1963) affd. 326 F.2d 237 (5th Cir.) cert. den. 379 U.S. 929, 855 S.Ct. 324, 13 L.Ed.2d 341 (1924).

It is clear, as held in *Moor v. County of Alameda,* 411 U.S. 693, 93 S.Ct. 1785, 36 L.Ed.2d 596, 606 (N 14) and repeated in *Robertson v. Wegmann,* 436 U.S. 584, 98 S.Ct. 1991, 56 L.Ed.2d 554, 560, that one specific area not covered by Federal law is that relating to "the survival of civil rights actions under §1983 upon the death of either the plaintiff or defendant."

Since Federal common law does not allow recovery after death of an injured party, and any relief must be provided by legislation, the Federal Courts have allowed for the survival of such actions under the provision of 42 U.S.C. §1988, when the jurisdiction where the action arises provides for survival of actions. *Holmes v. Silver Cross Hospital of Joliet, Illinois,* 340 F. Supp. 125 (N.D. Ill. 1972); *Larson v. Wind,* 542 F. Supp. 25 (D. Kans. 1982); *Roberts v. Rowe,* 89 F.R.D. 398 (S.D. W.Va. 1981); *Brazier v. Cherry,* 293 F.2d 401 (5th Cir. 1961); *Hall v. Wooten,* 506 F.2d 564 (6th Cir. 1974); *Spence v. Staras,* 507 F.2d 554 (7th Cir. 1974); *Beard v. Robinson,* 563 F.2d 331 (7th Cir. 1977); 42 A.L.R.F. 163, 169.

Under the provisions of 42 U.S.C. §1988, as interpreted by this Court, and universally adopted in the Federal Court system, the present cause will be resolved in accordance with Wyoming law providing for the actions which survive the death of the person injured.

Wyoming's survival statute is W.S. 1977 §1-4-101 (Petitioner's Appendix p. 46). Its specific provision that "In actions for personal injury damages, if the person entitled thereto dies recovery is limited to damages for wrongful death" is unmistakable. It allows nothing for support, society, comfort, protection, care, companionship, services of the wife, other family members or beneficiaries.

Occasionally, it has been said that the two sections of Wyoming statutes dealing with wrongful death (listed as W.S. 1977 §§2-14-201 and 2-14-202 in Petitioner's Appendix p. 47, 48, but renumbered in 1982 by the Wyoming Legislature as W.S. 1982 Repub. §§1-38-101 and 1-38-102) constitute a type of survival statute. This is incorrect!

The Wyoming Supreme Court addressed the question at length in *Coliseum Motor Co. v. Hester,* 3 P.2d 105 (Wyo. 1931), pointing out that the predecessor of these statutes, (5560 and 5561 Wyoming Compiled Statutes 1920 — Defendants Appendix) the provisions of which were essentially the same, did not constitute a survival act, but rather legislation in which the measure of damages was for the *loss to the deceased's beneficiaries.* There, the Court at p. 197 said:

> "[1,2] 2. *It is the theory of the appellant that the statute in question is a survival act.* By that is ordinarily meant a statute which merely preserves and continues the right of action which the deceased had prior to his death. And it is argued that, under the authorities (17 C. J. 1197), since the decedent died instantaneously, he never had any right of action at all, and therefore respondent has none. Much and abstruse learning has been expended upon the proposition as to whether statutes like that under consideration are survival statutes or statutes creating a new cause of action. *We cannot agree with the appellant's argument. It flies directly in the face of the express provisions of the statute, which says specifically that an action for damages shall lie notwithstanding the fact that death may ensue, without limiting the right to cases where death is not instantaneous. Counsel would read that into the statute. It is not there. The foundation of the action is the wrongful act of the defendant which resulted in death. No remedy existed at common law.* The statute was intended to make a change. It is a survival statute in

the sense that damages may now be recovered for the wrongful act, notwithstanding that death may result, whether instantaneously or otherwise. *It gives a new cause of action for the same reason and for the further reason that the action is not one transferred from the decedent to the administrator but is one given directly to the administrator for the benefit of certain living relatives.* (Emphasis supplied)

The Federal Court has given the same interpretation to Wyoming's wrongful death statutes in *Ashley v. Read Construction Company,* 195 F. Supp. 727, 729 (D. Wyo. 1961), where it was said:

"The amount recovered under the statute is held for the persons entitled thereto. The whole import of the wrongful death act is to *benefit those persons who have been injured because of the death of their relative . . .*" (Emphasis supplied)

The distinction between wrongful death statutes and survival statutes was addressed at length by this Court in the footnotes of *Sea-Land Services, Inc. v. Gaudet,* 414 U.S. 573, 39 L.Ed.2d 9, 94 S.Ct. 806. These teachings were noted and followed by the Wyoming Supreme Court in *DeHerrera v. DeHerrera,* 565 P.2d 479, 482 (Wyo. 1979) where it was said:

"It would be helpful to a further and better understanding of our reasoning if we explain the distinguishing features of a wrongful death act as compared to a survival statute. It must be realized that the wrongful death statutes, §§1-1065 and 1-1066, are not part of the probate code, though provision is made for the appointment of an administrator. The designation of an administrator as a trustee is only a device to provide a party to file suit and pay over any damages collected to the beneficiaries designated by statute. The amount recovered does not become a part of the decedent's estate and is not

liable for debts of the estate or subject to estate administration. Jordan v. Delta Drilling Company, Wyo. 1975, 541 P.2d 39, 42.

On the other hand, a survival statute permits recovery by the decedent's personal representative on behalf of the estate; the prime difference between survival and wrongful death statutes is that the survival statute merely continues a cause of action in existence. The injured party's claim after death is an asset of the estate while the wrongful death statute creates a new cause of action for the benefit of designated persons who have suffered the loss of a loved one and provider. Speiser, Recovery for Wrongful Death, 2d (1975), §14:1, p. 408. As said in Sea-Land Services, Inc. v. Gaudet, 1974, 414 U.S. 573, 94 S.Ct. 806, 39 L.Ed.2d 9, footnote 2, reh. den. 415 U.S. 986, 94 S.Ct. 1582, 39 L.Ed.2d 883, survival statutes permit the personal representative of deceased to prosecute any claims for personal injury the deceased would have had but for his death but do not permit recovery for harms suffered by the decedent's family as a result of his death."

Plaintiff Rosa obviously brought her action under the provisions of the wrongful death statutes (W.S. 1977 §§2-14-201 and 2-14-202, renumbered W.S. 1982 Repub. §§1-38-101 and 1-38-102), since she alleged that:

"Immediately prior to death, Michael Rosa, decedent, was an adult person of the age of twenty-nine years who was in good physical and mental condition, was a faithful and dutiful husband and father and *source of support, society, comfort, protection, care, companionship and services* to his beneficiaries . . . As the direct and proximate result of the above conduct of the Defendants, the Plaintiff, as the Personal Representative of the decedent, Michael Rosa, had been damaged in excess of

$1,000,000.00, including *damages for loss of probable future companionship,* society and comfort." (Tr. Vol. I, pp. 2, 7, 8) (Emphasis supplied)

Thus, Plaintiff sought damages *for herself* and other beneficiaries of the decedent, under Wyoming's wrongful death statutes, not the damages which the decedent might have claimed entitlement, under 42 U.S.C. §1983 for violation of his constitutional rights, had he lived. Accordingly, Plaintiff had no cognizable claim under 42 U.S.C. §§1983 and 1988, as her pleadings fully demonstrated.

The Trial Court should have granted Defendants' Motion to Dismiss. The decision of the Circuit Court should be reviewed and, upon full consideration, should be reversed.

Respectfully submitted,

GLENN PARKER
JAMES L. APPLEGATE
HIRST & APPLEGATE
200 Boyd Building
Cheyenne, Wyoming 82001
Attorneys for
City of Rock Springs,
Matt Bider and James Callas